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# Supreme Court of the United States

**OCTOBER TERM, 1965.**

| | |
|---|---|
| A Book Named "John Cleland's Memoirs of A Woman of Pleasure", G. P. Putnam's Sons (Intervenor), *Appellant*, *v.* Attorney General of the Commonwealth of Massachusetts, *Appellee.* | No. 368. |

## REPLY BRIEF FOR APPELLANT

### Appellee's Point I—Social Importance[1]

Appellee, we suggest, reads too quickly. He speaks at one point of what may be found if the book is opened "at random" (7), and at another he refers to "any given twenty-page section" (13). He dwells on the subject matter of the book, while he neglects its qualities as literature and ignores the observations and reflections, large and small, that would impress a reader proceeding at normal pace. The attitude adopted by Appellee is that of the browser rather than the reader. This affects his entire argument.

It is also affected by the fact that Appellee imports elements of the prurient interest test and the patent offensive-

[1] For convenience, this reply brief follows the outline of the Brief for Appellee. Numbered references are to pages of the Brief for Appellee, unless otherwise indicated.

ness test into the discussion of social value. He argues, under this head, that *Memoirs* describes sexual relations "in an uncommonly explicit manner" (7) and cites the book's "power to arouse" (10), having quoted the trial justice to this effect (9).[2] These items are relevant, if at all, to the tests of prurient interest and patent offensiveness. Whether a book has the literary or scientific or artistic value that constitutes social importance is the sole inquiry on the present point. Appellee recognizes this, and states that "material containing some redeeming features or 'social value' must be accorded the guaranties of the First Amendment" and that only "material utterly lacking in such value" may "constitutionally be suppressed" (5). Yet Appellee contradicts his own statement of the standard; he would deny that there is value in the book because, he asserts, it is explicit and sexually stimulating.

Appellee's argument here is affected, again, by his reduction of the social value test to a level where it would protect only "ideas" in an extremely restricted sense (8, 9, 10). He would confine social importance to the expository communication of ideas, and exclude literary and artistic values. This position contradicts the statement of *Jacobellis* (which Appellee cites) "that material dealing with sex in a manner that advocates *ideas . . . or* that has *literary or* scientific *or artistic value or* any other form of social importance, may not be branded as obscenity and denied the constitutional protection" (378 U. S. 184, 191; emphasis supplied).[3]

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[2] The Findings, Rulings and Order of the trial justice are, we submit, full of error. An indication is seen in the trial justice's statement (R. 113) that "This 'book is pitched at the nadir of scatology'. . . ." There is, of course, no scatology in *Memoirs.*

[3] As well as the statement of the Massachusetts Supreme Judicial Court, in *Attorney General* v. *Tropic of Cancer,* that "the First Amendment protects material which has value because of ideas, news, or artistic, literary, or scientific attributes . . ." (345 Mass. 11, 19, 184 N. E. 2d 328, 333).

Appellee distorts the social value test in other ways. His argument implies that the test demands greatness in a work. Appellee compares *Memoirs* "to a masterpiece such as *Ulysses*" (8); complains that "Cleland was in no way a major or even a comparatively significant figure in eighteenth-century English literature" (8); and speaks of what the "relative merit" of the book may be (9). But a standard that preserves First Amendment protection for all material except that which is "utterly without social importance" does not distinguish between major and minor writers, nor does it confine its protection to "masterpieces".[4] Appellee's argument here represents a reversion to the pre-*Roth* notion that, among works which might be deemed sexually stimulating, only "classics" were beyond the reach of anti-obscenity statutes. At least since the time of *Roth* and *Alberts,* it has been the law that if a work has a demonstrated literary value, the First Amendment applies, and the precise place of the work in the ranks of literature—a place which, experience shows, may vary widely from generation to generation—is of no constitutional concern.

Appellee also argues that *Memoirs* has not been included in college reading lists or general collections (8). We suggest that it is not realistic to attribute this to lack of merit. Moreover, Appellee's statement can refer only to the past; the fact that many college libraries have ordered copies of the book (R. 83) indicates that it will not hold good for the future. The book is unlikely to appear in undergraduate curricula, but it might very well be included in graduate studies. Finally, and fundamentally, the question in a case such as this one is not whether the work should be read in

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[4] When Appellee says that Cleland was not a "major" figure, we can agree; when he says that "Cleland was in no way . . . even a comparatively significant figure in eighteenth-century English literature", he is making a statement that is contrary to the record (R. 28-31, 55-56, 72, 88).

college courses, but whether government, state or federal, should be permitted to decree its total suppression.[5]

Appellee assumes that if the values of a work are apparent only to better-educated readers, then those values need not be recognized for constitutional purposes (8). This would make the average person (or possibly the person below average) the judge of what books have sufficient merit to be preserved against suppression. The argument both borrows and alters a concept taken from the prurient interest test, and it works an extreme distortion upon the concepts of literary and artistic value. Appreciation of art and literature can often be gained only through an expenditure of effort; a certain level of cultivation or a certain amount of background may be required. The best of painting and music and writing demands an active participation on the part of the viewer or listener or reader. It is easy to be entertained; it is not always easy to attain the deeper satisfactions that art affords. Instances abound of works, acknowledged to be valuable, whose appreciation can be a difficult matter. Indeed, Appellee himself cites one of them: the merits of *Ulysses* are not apparent to the average reader, or even to many whose education in

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[5] Appellee seeks to make a point of the fact that, until recently, the circulation of the work has been "for the most part clandestine" (6). Examples of works of value whose circulation has, by force of law, been kept clandestine are of course plentiful. Appellee's own state supplies examples: Theodore Dreiser's *An American Tragedy* (271 Mass. 318, 171 N. E. 472), Lillian Smith's *Strange Fruit* (318 Mass. 546, 62 N. E. 2d 840), Erskine Caldwell's *God's Little Acre* (326 Mass. 281, 93 N. E. 2d 819). *Ulysses* and *Lady Chatterley's Lover* are other examples, and, in connection with the former, Judge Augustus Hand's observation may be recalled:

> ". . . The foolish judgments of Lord Eldon about one hundred years ago, proscribing the works of Byron and Southey, and the finding by a jury under a charge by Lord Denman that the publication of Shelley's 'Queen Mab' was an indictable offense are a warning to all who have to determine the limits within which authors may exercise themselves . . ." (*United States* v. *Ulysses*, 72 F. 2d 705, 708).

literature is considerably above average. If the necessary degree of education has not been attained, a great work may only be puzzling, or boring.

We do not concede that the merits of *Memoirs* are so arcane. An attentive reading, of the whole book, is all that is required, not a course in eighteenth-century literature. *Memoirs* is not great literature, but its values as literature are substantial, and not at all difficult for the serious reader to appreciate. But if the values of the work were apparent only to a learned few, that fact would not prove the utter absence of social importance. The First Amendment protects works whose values may be apparent only to a minority. There is no snobbishness in this principle; on the contrary, it is part of the prescription for a healthy democracy.

Appellee mentions "intellectual contortions of expert witnesses" and "intellectual strain" (7). We refer to the material on pages 26 and 27 of our main brief, and submit that a reading of the testimony, and of the documentary evidence, reveals no contortions and no strain. The values that are pointed out can be seen by any careful reader of the book; he need not be a professional scholar or critic.

Appellee treats the phrase "redeeming social importance" as though the redemption of material dealing with sex can be accomplished only by the inclusion, in the same work, of material dealing with other subjects (10). He asserts (incorrectly, we submit) that "material other than sexual description is totally lacking" in *Memoirs*. By way of contrast, he finds the redemption of *Lady Chatterley's Lover* in "the author's reactions to the effects of industrialization in England" and of *Tropic of Cancer* in its "excellent descriptions of Paris and many pages of Miller's interesting philosophy" (9). Appellee thus interprets the social value test to mean that sex can be the subject of a book only if the book has other subjects as well; the writer must pay a toll of non-sexual material when he wishes to write about sex. If the point had any relevance, it would

be to the prurient interest test. It surely cannot affect the literary merit of a book that it deals with one subject rather than another, nor will this Court accept the notion that the subject of sex is an unimportant one (*Roth* v. *United States*, 354 U. S. 476 487).

Appellee charges that the "book has little more than the bare outline of a plot" (8). Elaborate plotting may often be appropriate, but it is certainly not a necessary element in a work of literature. Early novels are often collections of episodes, and, to move to the twentieth century, it is difficult to give a coherent summary of the plot of *Tropic of Cancer*, or of other impressionistic writing whose merit has been recognized. But the fact is that *Memoirs* has a definite plot, which involves not only the heroine's experiences, but also the growth of her understanding and the maturing of her character (R. 42-43, 54-55, 59-64, 73).

Appellee next says:

> "Character development, despite some suggestions by expert witnesses appearing on behalf of the publisher, is practically non-existent. Individuals appear primarily as good or bad, clever or dull, etc. Fanny herself grows in experience, but changes little if at all in character. Descriptions of skill and consequence are confined entirely to sex portrayals; they are not devoted at all to places, and rarely to people." (8)

In stating that there are "descriptions of skill and consequence" in the sex portrayals, Appellee, we suggest, is stating himself out of court. Assuming that a work were devoted entirely to "sex portrayals", still it would not be subject to suppression if it were at the same time "literature of skill and consequence". Indeed, in speaking of "consequence", Appellee has chosen a synonym of "importance".

But in any event the quoted passage is inaccurate from beginning to end. It cannot be made to jibe with any sort of fair reading of the book. Appellee is simply

not describing the book before the Court. Fanny herself is a sharply delineated character. Often capricious in her actions, she is conscious of her faults, introspective and unsparing about her motives. She is acute in her observation of people; generally tolerant, she is capable of indignation. She displays a democratic bias—an emphasis on the character of an individual as distinguished from his station in society—that is particularly interesting in the period of sharp social differentiation in which the book was written. Combining a natural lustiness with a respect for the processes of intellect, she represents, in these aspects, a model of the Enlightenment.

Charles displays tenderness and fidelity, and, in the beginning, he is able to teach Fanny about the world. But he has faults, and Fanny is conscious of them. He is careless with money; he is poorly educated; the store of knowledge that he can impart to Fanny is soon learned; and, as Fanny herself points out, he lacks "those great and shining qualities that constitute a genius, or are fit to make a noise in the world" (Ex. A., p. 57). It is characteristic of each of them that it is Fanny, not Charles, who brings a fortune to their union.

The fortune comes from Fanny's older lover, the "rational pleasurist" (Ex. A, p. 200). He is a self-made man, a representative of the eighteenth-century entrepreneurial ideal. His legacy to Fanny, as she recognizes, is more than money. He teaches her self-respect and the possibilities of self-improvement. By his example, he shows her the proper uses of wealth, the importance of dignity, and the values of moderation. He is the first from whom Fanny derives her final philosophy that the pleasures of the mind are superior to the pleasures of the body, and that the two are not incompatible, but complementary.

Mrs. Cole is a complicated character, who will not fit into Appellee's categories of "good or bad". Scrupulously fair

with her girls, she is not above occasionally deceiving a customer. She teaches Fanny how to take care of herself, physically and financially. Generally compassionate, she is nevertheless bitter on the subject of homosexuality: "* * * *in fine,* they were scarce less execrable than ridiculous in their monstrous inconsistence, of loathing and condemning women, and all at the same time apeing all their manners, airs, lips, skuttle, and, in general, all their little modes of affectation, which become them at least better than they do these unsex'd male-misses." (Ex. A, pp. 182-183.) Fanny gains a good deal in understanding from Mrs. Cole, but later rejects her primitive hedonism.

Fanny's motivations at the various turns in her history are plausible and psychologically valid. She is a real person, and not one of the automatons that act out the mechanistic trash which occupies so much space on our newsstands. Through her are presented the observations and reflections that mark a work of literature.

The many minor characters are described with wit and perception. Mrs. Jones, Fanny's first landlady, is totally motivated by money, "indifferent . . . to every other pleasure but that of increasing the lump by any means whatever . . ." (Ex. A, p. 61). Fanny's colleague, Emily, is "one of those mild, pliant characters that if one does not entirely esteem, one can scarce help loving, which is not such a bad compensation neither. Owing all her weakness to good-nature, and an indolent facility that kept her too much at the mercy of first impressions, she had just sense enough to know that she wanted leading-strings, and thought herself so much obliged to any one who would take the pains to think for her . . ." (Ex. A, p. 196).

The flagellant, Mr. Barville, is described with striking insight. His physical appearance is peculiarly appropri-

ate to his sick personality. Fanny makes the interestingly modern discovery that his cruelty to others comes from a hatred for himself, and that his masochism (a malady then not yet named) "render'd him incapable of receiving any pleasure till he submitted to the extraordinary means of procuring it at the hands of pain" (Ex. A, p. 168). She even suggests a possible source of his trouble; he was "condemn'd to have his pleasure lashed into him, as boys have their learning" (Ex. A, p. 167).

These are examples of characterization, not an exhaustive list. (The comments of the witnesses and the critics on the point appear at R. 28-32, 42-43, 45, 54-57, 64, 67, 74, 87.) The summaries are enough to demonstrate the inaccuracy of Appellee's statement, but they do not do justice to Cleland's work. The book deserves to be read as carefully as Cleland wrote it.

The culminating idea that Fanny presents—which, as Appellee puts it, is "that love is essential to the complete sexual relationship"—is, he argues, "neither original nor especially profound" (8). As to its "profundity", certainly the idea goes to the heart of the human experience. As to originality of basic ideas, if that were a requisite, there would be very few works of fiction that could claim social importance. It is the philosopher's function, not the novelist's or the playwright's, to produce major original ideas. That ambition, jealousy and irresolution can destroy a man are themes that were thought of and expressed before *Macbeth, Othello* and *Hamlet* were written.

The idea, says Appellee, "could have been presented just as forcefully with a fraction of the erotica . . ." (8). And he objects that the "sexual portrayals are included not to illustrate a theme, but for their own sake and interest" (8). But this is a novel, not a tract. Indeed, it is a frequently-encountered criticism of unsuccessful novels that they constitute argument with examples attached, rather

than products of the art of fiction.[6] Moreover, Appellee is prescribing a course for the writer to follow: he is thus undertaking a responsibility that is the artist's own, and not the government's.[7]

Appellee concludes his discussion of social value by repeating his two main points. One is that "Ideas as such are totally absent in the book before the Court" (10). This is both inaccurate and irrelevant. *Memoirs* tells us about people, and how they react to each other; it describes events and emotions. This is the principal business of fictional literature. Ideas in the expository sense may often be included in fiction, and they are included in this book, as Fanny generalizes upon her experiences. But even if they were not, their absence would not prove the absence of value. What is the "idea as such" in Yeats' *Leda and the Swan,* or in Hemingway's *The Killers?*

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[6] *Lady Chatterley's Lover* has been adversely criticized for the very characteristic to which Appellee attributes its protection. Its tendency to become an exhortatory essay impairs its quality as a novel. Thus, in reviewing the book for the *Washington Post & Times-Herald* (May 3, 1959) Glendy Culligan wrote:

> "It is both ironic and characteristic of Lawrence that his artistic failure in "Lady Chatterley" came not from an excess of lust but an excess of moral indignation. The early love scenes achieve a poetic tension which has probably not been duplicated in English literature, but Lawrence allowed a vituperative note to destroy the effect of later meetings. In them, Mellors steps out of character to become the mouthpiece for Lawrence and for his chronic shrill attack on modern woman. There, the pulpit replaces the drama."

[7] See Clark, Ch. J., in holding *Lady Chatterley's Lover* not obscene:

> "* * * Obviously a writer can employ various means to achieve the effect he has in mind, and so probably Lawrence could have omitted some of the passages found 'smutty' by the Postmaster General and yet have produced an effective work of literature. But clearly it would not have been the book he planned. * * *" (*Grove Press, Inc.* v. *Christenberry,* 276 F. 2d 433, 438 (2 Cir.).)

The other point to which Appellee returns is that the book is "a product containing no intrinsic merit other than its power to arouse." Scanning "at random" will perhaps produce the impression of the book on which Appellee's brief is based. There are of course many sexual incidents, and detailed descriptions, and if the leaves of the volume are spun, the impression may well be different from that which is gained when the book is really read. Appellee refuses to see what each of the qualified witnesses sees in the book, and what V. S. Pritchett, Brigid Brophy and J. Donald Adams see in the book, and what any reasonably attentive reading of the book itself discloses.

### Appellee's Point II—Prurient Interest

Appellee uses the concept "average person" in two quite different ways. At times he speaks of the impact of the book on the average person—that is, the person not particularly susceptible—and this is in accord with the statement of the prurient interest test in *Roth*. At other times he speaks of the average person as the one who will judge whether the book is obscene, and this, as we have urged in our main brief, is not the meaning of the prurient interest test. Page 12 of his brief has the average person measuring what he reads against contemporary community standards; Appellee thus transfers to the average person a function that belongs to the courts. At both pages 11 and 12 of his brief, Appellee contrasts the average person with the literary expert. But the Publisher's witnesses were not called to testify with respect to prurient interest; they were called to testify with respect to social value. So far as the prurient interest test is concerned, one who is highly educated in literature may or may not represent the "average person"; similarly, one who is poorly educated in literature may or may not be "average" in this sense. The distinction that Appellee draws has no relevance to the prurient interest test. And, so far as the social value test is concerned, Appellee's contrast of the expert with the average man means that the outcome should be deter-

mined by a hypothetical majority, in contravention of the central meaning of the First Amendment.[8]

On these same pages, Appellee emphasizes the frequent appearance and wide distribution of "sex-filled volumes". It is difficult to see how this helps his case. If it demonstrates anything, it demonstrates contemporary community acceptance of the subject of sex in reading matter. Moreover, Appellee's reference to "newsstands" suggests that most of what he has in mind is quite different from *Memoirs*. The usual newsstand paperback dealing with sex is not ordered by universities and libraries (R. 83).

On the point of what the public has become inured to, Appellee says that the newspaper reports of the Profumo affair "do not compare in any way to the descriptions in *Memoirs*" (13). We respectfully refer the Court to Exhibits C through I (unprinted).[9]

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[8] Appellee's argument at this point seems to derive from older cases in which literary value was regarded as significant only if it outweighed lustfulness—an approach which antedates judicial consideration of the matter in a constitutional context, and which involves a balancing of interests not appropriate where expression alone (and not expression mixed with conduct) is at issue.

[9] They include the following:

> "The next witness Margaret Ricardo admitted one conviction for prostitution. She said she and a girl friend and Ward and another man all had sex relations in the same room. ¶'All four together?' inquired Judge Marshall. ¶'Yes.' ¶'All four of you taking part?' the judge persisted. ¶'Yes.' ¶'What happened in the room with the four of you together?' the judge continued. 'Anything beyond sexual intercourse?' ¶Miss Ricardo, a 23-year-old former Paris night club dancer shook her head affirmatively." (*Boston Traveler*, July 23, 1963, p. 12, cols. 3-6)
>
> ". . . galloping rumors of a prominent person wearing only a mask while serving as a slave waiter at an orgy of play-for-pay girls and their male customers." (*Boston Record-American*, July 1, 1963, p. 5, col. 5)

If a national rather than a local standard is to be applied, the treatment of the affair in newspapers outside Boston may be noted.

*(Footnote continued on next page)*

We agree with Appellee that there are differences between these reports and *Memoirs*. The newspaper reports offer the excitement of telling about real people, and people in high places; they add the stimulation of photographs; there is an air of morbidity that the book as a whole does not have; and the total audience reached by the newspapers is many times that of the book. There is also a difference in that the social value involved is that of news rather than literature. But with respect to community tolerance toward the treatment of sexual incidents on the printed page, the similarity is striking.

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(Since these quotations are made only to show the fact of what appeared in prominent daily newspapers, and not to prove the truth of the matters reported, the taking of judicial notice is, we submit, appropriate.) The daily having the largest circulation in the United States contained the following:

> "Maria claims that the man in the hangman's style mask wore brief, striped underpants at the party, but other guests are definite that he wore no more than a pink ribbon bow in addition to his mask and that guests amused themselves by tugging at it while he was serving them." (*New York Daily News*, July 6, 1963, p. 4, col. 1)
>
> "She denied suggestions that the masked man was reviled and beaten like a slave and that he ate food from a dish on the floor like an animal." (*New York Daily News*, July 6, 1963, p. 4, col. 1)
>
> "She agreed and went to the apartment where a naked man was awaiting her in the bedroom. Asked how long it took from the pickup point to the bed, she replied, 'about eight minutes'. ¶"In the apartment she asked where the man was. 'He said he was waiting for me in the bedroom. He gave me a contraceptive and told me to strip'." ¶" 'The man was in bed, naked. There was a hole in the wall where there had been a two-way mirror'." ¶"While Ward made coffee she said. [sic] She had had sexual relations with the waiting man. Then they drank coffee." (*New York Daily News*, July 25, 1963, p. 3, col. 3)

The newspapers in the nation's capital had similar accounts:

> " 'Then,' she said, 'there was a dinner party where a naked man wearing a mask waited on table like a slave. He

*(Footnote continued on next page)*

Newspaper editorials are to some extent an expression of community standards, and the similarity between the reports and the novel was editorially noted at the same time that a decision holding *Memoirs* not obscene was editorially approved:

> *"Miss Hill, Meet Miss Keeler*
>
> "The State Supreme Court ruling that the 18th-century novel, 'Memoirs of a Woman of Pleasure,' better known as 'Fanny Hill,' is not obscene and cannot be barred from sale in New York was inevitable. The city's Corporation Counsel and District Attorneys only invited trouble when they tried to decide that this (or any other) book is 'obscene.' One reader's obscenity is another's artistry. For a public official to set himself up as a literary critic is censorship. 'Fanny Hill' isn't great literature. By today's standards, it isn't even gamy. We live in a time of open revelation and too often of sordid detail; we would not want to ban a Profumo scandal from the public prints, distasteful as most of its

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had to have a mask because he was so well known.'" (*Washington Evening Star,* June 8, 1963, p. A3)

"In today's hearing, a 19-year-old girl identified as 'Miss X' testified that Ward tried to get her to perform in a bedroom equipped with a peek-through mirror. * * *

"She told him she wasn't interested in watching, but she testified that Ward replied to her: 'Darling, I don't want you to watch, I want you to perform.'" (*Washington Post and Times-Herald,* June 30, 1963, p. A3, cols. 2-4)

"* * * He asked her to go to a party and said he would pay her for it, she said. But instead she was driven to Ward's flat, handed a contraceptive and told to get into bed with a naked man in the next room.

"* * * Sometimes there was a man in bed waiting for her. Sometimes the man asked her to hit him with a cane or a whip—which she did, dressed in her underwear. * * *

"When counsel asked what the going rate would be, she said five pounds ($14) for normal intercourse and one pound ($2.80) a stroke for beating." (*Washington Post and Times-Herald,* July 25, 1963, p. A3, cols. 1-2)

> revelations were. Real-life incidents often exceed fictional ones. Miss Hill, meet Miss Keeler." (*New York Times,* August 24, 1963.)

Appellee says that the average person would be "surprised and probably discomforted" if the subject matter of the book were discussed in public (12). We refer to what is said in our main brief on the differences between reading and less private forms of communication. There is a great deal, in many books that are publicly accepted and highly regarded, which would create embarrassment if it were recited aloud to a public assembly. The situation is altogether inapposite.

Appellee cites the language of the A. L. I. Model Penal Code, which describes prurient interest as a "shameful or morbid interest" (14). But nowhere in his argument on prurient interest does Appellee assert that *Memoirs* is predominantly shameful or morbid. Nor could he. Instead, Appellee speaks in such terms as "highly erotic" (12). What Appellee is saying amounts, at most, to no more than that the book may stimulate a normal sexual response in the reader, and this, as we have urged in our main brief, is not the test of prurient interest. When Appellee states that "The dominant theme of the book is the portrayal in prose of sex and sexual relationships" (14), he is not describing a book whose predominant appeal is to prurient interest. He is merely describing the subject matter of a book, a subject matter that writers are free to deal with (*Roth* v. *United States,* 354 U. S. 476, 487).

Comparing *Memoirs* with other books that have been held not obscene, Appellee offers as a distinction that these other books "contain many passages of real merit, and whole sections having nothing at all to do with sex" (14). Here Appellee is confusing the social value test with the prurient interest test (which he concedes should not be done), and he is asserting the constitutionally invalid notion that what is otherwise prurient is saved from prurience if it is mixed with non-sexual material. The argu-

ment involves the propositions that sexually-exciting objects or descriptions are less exciting in a non-sexual environment, and that repetition of sexual description increases its interest—propositions which experience contradicts. Moreover, it is difficult to see how comparisons with *Tropic of Cancer* and with *Lady Chatterley's Lover* can help Appellee's case. On the contrary, they remind us that Appellee's arguments about the alleged reasons why the "average person" will buy the book have been made before, and rejected.[10] Moreover, these precedents show that no ground for suppression is supplied by Appellee's charge that *Memoirs* describes sexual experiences "in a manner which leaves virtually nothing to even the dullest imagination" (12).[11]

Appellee refers to one who purchases *Memoirs* with "a knowledge of what it is [that is, what Appellee says it is] and the intention to indulge in what is clearly the book's prime attraction" (11). Appellee is apparently interested in protecting the normal adult from indulging in the private sin of reading the book. This, we suggest, is not the business of government. An anti-obscenity statute, limited as it must be by the First Amendment guaranties, cannot be made to serve such purposes. That it should not be made to serve such purposes was recognized long before our Constitution came into being.[12]

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[10] *E.g.*, in the Brief for the Petitioner, page 21, in *Attorney General* v. *Tropic of Cancer*, 345 Mass. 11, 184 N. E. 2d 328.

[11] *Tropic of Cancer*, of course, has been before this Court. As to *Lady Chatterley's Lover*, the degree of detail is certainly not less than that of *Memoirs* (see, for example, pages 207-209 and pages 251-254 of the Grove Press hard-cover edition; pages 228-231 and 269-271 of the paperback edition), and the differences in the style of the two works are such as to bring the reader into much closer contact with the experiences of the characters in *Lady Chatterley's Lover*.

[12] Aquinas, Question XCVI, Second Article, in Pegis, *Basic Writings of St. Thomas Aquinas* (Random House, 1945, Vol. 2, pages 791, 793); Rommen, *In Defense of Natural Law*, in *Law and Philosophy* (New York University Press, 1964, page 111).

Appellee engages in an attempt to explore John Cleland's motives and intent in writing the book (14). Assuming that the determination of the state of mind of John Cleland in 1749 is a plausible subject for judicial inquiry, it is an inquiry that must be deemed irrelevant. What is to be judged is the book that was created, not the situation that may have brought about its creation. Whatever may have been John Cleland's objective, the fact is that he produced a work of art.[13]

Appellee's final point under this heading is that the "average person selects this book because he can find therein material which is unusual, and rarely produced for consumption by the general reading public" (15). For one thing, this is a necessary consequence in each case where a previously suppressed book has been held entitled to publication; formerly forbidden material is made available, and this very fact will create interest. For another, the point that readers are interested in reading about sex is neither news nor a constitutional consideration. The courts that held *Lady Chatterley's Lover* and *Tropic of Cancer* to be within the protection of the First Amendment were as much aware as Appellee that many people would read these books for their sexual interest and the sexual excitement they offered. The unexpurgated *Lady Chatterley's Lover* was published in hard cover by Grove Press, and then, because the book was not in copyright, published in paperback by Dell, by New American Library, by Pocket Books and by Pyramid. Some seven million copies of *Lady Chatterley's Lover* were sold. Over two and a half million copies of *Tropic of Cancer* have now been sold. The judges who decided those cases were not innocent of the possibilities upon which Appellee puts so much stress. The point,

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[13] William Faulkner's introduction to the Modern Library edition of *Sanctuary* (Random House, 1932, 1959) begins:

> "This book was written three years ago. To me it is a cheap idea, because it was deliberately conceived to make money. . . ."

rather, is that these possibilities do not dispose of First Amendment questions. Whether or not we approve of the fact that people look for sexual excitement in what they read, in what they watch on television, in what they see in theatres—the fact exists, and it cannot in itself exclude material from the protection of the First Amendment. If it did, huge areas of art, entertainment and advertising would be subject to censorship, and "the door barring federal and state intrusion into this area" would have to be opened far wider than "the slightest crack necessary" (*Roth* v. *United States,* 354 U. S. 476, 488).

But in any case the interest of the public in material dealing with sex cannot account for the long life of *Memoirs.* As Appellee himself points out, there is a great deal of reading matter available to the public that is devoted to sexual experience. Trash is soon discarded; a book that continues to be read in the third century after its first publication must have other qualities. In the words of V. S. Pritchett, *Memoirs* "has its place in the history of literature, not in the history of smut. Smut never lasts." (R. 28).

### Appellee's Point III—Patent Offensiveness

Here Appellee rests his argument on the assertion that "Something is patently offensive when it violates an individual's concept of appropriate behavior" (16). There is no authority for the assertion; certainly *Manual Enterprises* does not provide it. If the narration of matters that violate "an individual's concept of appropriate behavior" constitutes patent offensiveness, then there are very few works of fiction that can pass this constitutional test.

Appellee then says: "This is a test which relates to the sense of propriety and good taste of the average person" (17). We have pointed out in our main brief, in discussing the prurient interest test (at page 13), that the use of an average notion of what is objectionable would impose a

deadening restriction on art and literature—a restriction that the constitutional guaranties do not tolerate. But quite apart from appellee's misuse of the "average person" aspect of the prurient interest test, propriety and good taste are not standards by which the scope of the First Amendment is measured. They are rather, standards of behavior, or standards of literary and artistic criticism. Every one of our media of art or entertainment furnishes frequent instances of impropriety and bad taste—whether in sexual or non-sexual material. A few hours in front of a television set will yield a wealth of documentation. Propriety and good taste, desirable as they may be, do not, under the Constitution, set limits on freedom of expression.

It is something far beyond impropriety and bad taste that *Manual Enterprises* refers to. We respectfully invite the Court's attention to the magazines involved in *Manual Enterprises*, and suggest that the words "propriety" and "good taste" cannot possibly be applied.[14]

Putting together different sections of the brief, it is difficult to determine whether Appellee objects to *Memoirs* because it attracts or because it repels. At times his position is that the descriptions of sexual activities are too alluring (*e.g.*, 9, 11-12, 15); at this point he is saying that they are too repellent.

Appellee argues that "skillful writing" will not avoid the charge of patent offensiveness (17). It is not the general excellence of the writing to which we have drawn attention in this aspect of the matter; it is specifically its elegant and seemly language, the use of periphrasis and metaphor,

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[14] We refer to the Government's description of the magazines, set forth in footnote 13 at 370 U. S. 478, 489, 490. Mr. Justice Harlan's opinion states that the Government's description "tends to emphasize and in some respects overdraw certain features in several of the photographs . . .". It is clear, however, that the material itself was far removed from the area of propriety and good taste. The opinion describes the magazines as "dismally unpleasant, uncouth, and tawdry".

the absence of coarseness and vulgarity. Literary skill may be employed in either direction here. It can be used to make writing deliberately offensive—and a great deal of contemporary literature employs this device.[15] It can also be used to make decorous what might otherwise be rude and offensive, and this is an end to which Cleland devotes his considerable talent. His subject matter is one that most people would not include in social conversation, but this is true of many books, and the concept of patent offensiveness goes to expression, not to underlying subject matter.[16] So far as the patent qualities of the work are concerned, *Memoirs* is the very opposite of offensive.

We agree with Appellee that absence of four-letter words does not in itself control the question, but it is highly relevant. And the grace and elegance of the language of *Memoirs*, its advocacy of the natural and its rejection of the sordid, the fact that it has none of the scatology that is found in *Tropic of Cancer* and many other modern works—all these place the book well outside the field of the patently offensive.

### Appellee's Point IV and Conclusion

In Point IV Appellee urges that the *Roth* opinion is "the primary guide in this area" (18), that *Jacobellis* was a "clear reiteration of the standards set forth" in *Roth* (19), that three tests have been developed to determine whether material is obscene (22), and that:

> "The portrayal of sex in and of itself is not sufficient to deny a work First Amendment protection; but hard-core commercial pornography without redeeming importance would not be protected." (20).

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[15] A device not confined to contemporary literature: cf. the works of Jonathan Swift.

[16] Mr. Justice Harlan's opinion cites the portion of the A. L. I. Model Penal Code that refers to "description or representation" (370 U. S. 478, 486).

There is no dispute between the parties on these points. Earlier portions of Appellee's brief show further areas of agreement—on the proposition that the First Amendment protects material unless it is found obscene under each of the tests considered independently (3-6), and on the emphasis that *Jacobellis* gave to the social value test of *Roth* and *Alberts* (6).

There is dispute, however, about the meaning of the *per curiam* reversals that followed *Roth* and *Alberts*. Appellee states that in those reversals "It does not appear that the Court acted in any way upon the question whether the materials were or were not obscene (18)". We submit that the statement is not accurate; it does appear that the Court considered the materials and held them not obscene. In *Jacobellis*, Mr. Justice Brennan wrote:

> "* * * Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights derived from the First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.[6]" (378 U. S. 184, 190).

The footnote appended reads:

> "[6]This is precisely what the Court did in *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35; *One, Inc.*, v. *Olesen*, 355 U. S. 371; and *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372. * * *"

In the same case, Mr. Justice Stewart wrote:

> "* * * I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts*, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. * * *" (378 U. S. 184, 197).

The cases cited by Mr. Justice Stewart in the accompanying footnote are *Times Film; One, Inc.; Sunshine Book;* and *Manual Enterprises.*

Nor is Appellee correct in explaining *Mounce* v. *United States* as turning simply on confession of error. The *per curiam* decision was rendered "*upon consideration of the record and* confession of error by the Solicitor General . . ." (355 U. S. 180; emphasis supplied).

Appellee also discusses the decision of the New York Court of Appeals holding *Memoirs* entitled to constitutional protection (*Larkin* v. *G. P. Putnam's Sons,* 14 N. Y. 2d 399, 200 N. E. 2d 760) (21). Appellee criticizes the majority opinion in that case and recommends the dissenting opinions. The majority opinion, in our view, makes an inadequate appraisal of the value to be found in *Memoirs.* What is significant, however, is that the majority saw sufficient value in the work to bring it within the protection of the First Amendment (14 N. Y. 2d 399, 403, 200 N. E. 2d 760, 762). The opinion, we submit, considerably underestimates the merit of the book. This, however, merely lends emphasis to the court's recognition of the principle that the application of the First Amendment does not depend upon a finding of great value.

The opinion is not analytical, but its conclusions are firm and clear:

> "* * * The Supreme Court has indicated with growing judicial resolution that New York's obscenity statute may not constitutionally be invoked to suppress a book of the standard and content of 'Fanny Hill'.
>
> * * *
>
> "It had become increasingly clear in a long line of decisions which foreshadowed those of June 22 [1964] that State obscenity statutes would no longer afford a constitutionally sound basis for the suppression of a book of the type of 'Fanny Hill'. . . ." (14 N. Y. 2d 399, 404-405, 200 N. E. 2d 760, 763).

The dissenting opinions with which Appellee agrees, and which the majority below found "more persuasive" (R. 124), do not, we submit, support either Appellee's argument here or the conclusion of the majority below. They repre-

sent a repetition of the view that literary or artistic values, no matter how substantial, cannot bring a book within the protection of the First Amendment if, under other criteria, it may be judged obscene. This was Judge Scileppi's view when he spoke for the majority in the *Tropic of Cancer* case (*People* v. *Fritch,* 13 N. Y. 2d 119, 192 N. E. 2d 713) and it remained his view when he came to consider the present book, despite the intervening decisions and opinions of this Court in *Jacobellis* and *Grove Press* v. *Gerstein.* His dissenting opinion in *Larkin* v. *Putnam's* is no more valid than his majority opinion in *People* v. *Fritch;* each represents a refusal to follow what should have been clear from the time of *Roth* and *Alberts*—and was clear to most high state courts that considered the matter[17]—and was made clear beyond question by *Jacobellis* and *Grove Press* v. *Gerstein.*[18]

Indeed, neither the dissenting opinion of Chief Judge Desmond nor the dissenting opinion of Judge Scileppi take the position that *Memoirs* is obscene under the decisions of this Court. Each is not so much a dissent as a protest. They do not state that *Memoirs* can be denied constitutional protection under the standards established by the decisions of this Court; rather they attack those standards, and appeal for a change in the law. Thus Chief Judge Desmond states:

> "* * * Hereafter, pornography no matter how gross (see *Grove Press* v. *Gerstein,* U. S. [June 22, 1964], validating 'Tropic of Cancer') is immune and safe so long as critics praise its writing

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[17] *Attorney General* v. *Tropic of Cancer,* 345 Mass. 11, 184 N. E. 2d 328; *Zeitlin* v. *Arnebergh,* 59 Cal. 2d 901, 383 P. 2d 152, cert. den. 375 U. S. 957; *McCauley* v. *Tropic of Cancer,* 20 Wis. 2d 134, 121 N. W. 2d 545.

[18] The one other high state court that agreed with *People* v. *Fritch*—the Supreme Court of Illinois—acknowledged its error after *Jacobellis* and *Grove Press* v. *Gerstein* were decided: *Chicago* v. *Kimmel,* 31 Ill. 2d 202, 201 N. E. 2d 386; *People* v. *Bruce,* 31 Ill. 2d 459, 202 N. E. 2d 497.

> style and discover 'social significance', whatever that may mean." (14 N. Y. 2d 399, 406, 200 N. E. 2d 760, 764).
>
> "* * * And into the law itself there has come from nowhere a new constitutional theory which licenses the most unrelieved sexual filth either on the theory of 'prevailing community standards' (*Larkin* v. *G. I. Distrs.*, 14 N. Y. 2d , [June 10, 1964]) or on a finding of literary merit or social values (*Grove Press* v. *Gerstein*, supra).* * *" (14 N. Y. 2d 399, 406, 407, 200 N. E. 2d 760, 764).
>
> "I refuse to believe that all this can continue to be the law. I predict that the wheel will turn and the pendulum swing back." (14 N. Y. 2d 399, 407, 200 N. E. 2d 760, 765).

And Judge Scileppi states:

> "The growing tendency to narrow the definition of obscenity and to demand impossible standards makes it virtually impossible to enforce any existing obscenity law or to enact any new legislation which can adequately protect our people from indecent and obscene publications. This is an incredible result which cannot long stand, for an aroused public is sure to bring about a change in the attitude that 'anything goes' in the area of printed material and motion picture productions." (14 N. Y. 2d 399, 408, 200 N. E. 2d 760, 765)[19]

We do not agree that this Court's standards make it "virtually impossible to enforce any existing obscenity law" or that under those standards "anything goes". We believe that history will prove Judge Desmond's prediction wrong, and will confirm the wisdom of this Court's application of the First Amendment to prevent the suppression

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[19] Judge Desmond was also troubled by a companion case in the Court of Appeals which held unconstitutional, as too vague, a New York statute prohibiting sales to minors: *People* v. *Bookcase, Inc.*, 14 N. Y. 2d 409, 201 N. E. 2d 14. Although *Memoirs* was the book involved, the publisher, appellant here, did not participate in that case.

of writing of value. But on the matter of what the law is, the New York Court of Appeals is unanimous; the difference between majority and minority is only on what the law ought to be. All seven judges (Judge Desmond and Judge Scileppi joined in each other's opinion, and Judge Burke joined in both) agree that, under the decisions of this Court, *Memoirs* may not be suppressed.

Appellee argues that unless there is an adjudication of obscenity in the present case, "it is extremely doubtful that the tests may ever successfully be applied to writing which is in novel form" (22). This presents the where-is-the-line-to-be-drawn question with which the law deals in many fields. Here again there are echoes of arguments made against *Tropic of Cancer* and *Lady Chatterley's Lover*. Justice Holmes' famous rejoinder to the citation of *McCulloch* v. *Maryland*—"not . . . while this court sits"—has become the accepted judicial response to arguments of this type.[20] Difficulties of degree and definition are not reasons for denying constitutional freedoms.

But the asserted difficulty is not a real one in the present case. There are books and magazines devoted to sex which, in cover and content, are characterized by a morbidity and a vulgarity that is not found in *Memoirs*. Moreover, they are in no way comparable to *Memoirs* as literature. It is not conceivable that evidence of value such as appears in the present record would be forthcoming with respect to such publications. The Court, as it has said, will consider each case of suppression on its own merits. There is no validity in the argument that a decision on *Memoirs* must necessarily be a holding for every publication "in novel form".

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[20] *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218, 223.

Appellee states that "a decision by the Supreme Judicial Court to the effect that *Memoirs* is obscene is the first time since the rendering of the *Roth* decision that that Court has concluded that a given piece of writing could constitutionally be suppressed" (22-23). The statement implies that the Supreme Judicial Court regarded *Memoirs* as exceptional. In fact, since the time of *Roth* and *Alberts*, the Supreme Judicial Court had had only two cases in which it considered the alleged obscenity of writing—this and the *Tropic of Cancer* case.

Appellee asserts that the Publisher seeks "to expand First Amendment guaranties ... far beyond what the United States Supreme Court has indicated is the limitation upon those guaranties" (21). On the contrary, we submit, the position of the Publisher, both in our main brief and here, has been based squarely on the decisions of this Court.

Appellee reverts at this point to his earlier argument that *Memoirs* does not have the literary merit of *Ulysses, Lady Chatterley's Lover* and *Tropic of Cancer,* saying that "It cannot be seriously maintained that *Memoirs* ranks with the abovementioned volumes" (21). Here, as elsewhere in his brief, it may be seen that it is Appellee, not the Publisher, who seeks a departure from the standards which this Court has set forth. Appellee would change "utterly without social importance" to read "without the redeeming social importance that may be attributed to the most highly-regarded works".

Appellee construes the Publisher's "Point 6" to mean that the Court should "insulate books completely from the operation of obscenity legislation" (22). This, we submit, is misconstruction. We have urged that different media of expression may be treated differently; that such conflicts as there may be with interests sought to be served by anti-obscenity legislation are less intense where books are concerned, and that books have a special importance for society.

This does not mean that there is nothing in book form upon which anti-obscenity legislation may operate. It does mean that where there are values in a book such as have been demonstrated here, the First Amendment precludes suppression.

Respectfully submitted,

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